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CHUNG ONN

v.

PP

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HIGH COURT MALAYA, TEMERLOH
AKHTAR TAHIR JC
[CRIMINAL APPEAL NO: 42-1-2009]
6 JANUARY 2010

C ***CRIMINAL LAW:*** *Penal Code - Sections 471 and 467 - Forged document - Appeal against conviction and sentence - Whether there was a nexus between s. 471 and s. 467 Penal Code - Whether s. 465 Penal Code the correct section for punishment*

D The accused was charged in the Sessions Court for using a forged document as genuine thereby committing an offence which was punishable under s. 471 Penal Code read with s. 467 of the same. The accused was found guilty of the charge by the Sessions Court Judge and was sentenced to 10 years imprisonment. The accused appealed against his conviction and sentence.

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Held (upholding conviction; imposing a term of 12 months' imprisonment on the accused):

(1) An offence under s. 471 of the Penal Code had been made out F against the accused and the prosecution had succeeded in proving the charge under s. 471 Penal Code beyond reasonable doubt. (para 8)

(2) A literal and proper reading of s. 471 shows that the person G using a forged document shall be punished in the same manner as if he had forged the document. A careful reading of this provision show using a forged document does not equate it to forging the document but merely equate it to forging the document for purposes of sentencing. No presumption or H inference arose in this provision that in using a forged document the person was said to have forged the document. Section 467 on the other hand starts off with the phrase 'Whoever forges a document.' Therefore there was no nexus between s. 471 and s. 467 of the Penal Code. Both provisions I must be read separately and putting both the provisions together was tantamount to a misjoinder and fell foul of s. 163

Criminal Procedure Code which provides that for every distinct offence there shall be a separate charge. Further there was no evidence and neither did the prosecution in this case attempt to prove that the accused had forged the document to bring the offence under s. 467 of the Penal Code. (paras 13, 14 & 15)

(3) Since an offence under s. 471 Penal Code had been proven the correct section for punishment was s. 465 of the Penal Code which provides for a maximum term of imprisonment of two years. After taking into consideration of the mitigation of the accused, this court imposed a term of 12 months' imprisonment from the date the accused was convicted in the Sessions Court. (paras 18 & 19)

Case(s) referred to:
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 163
Penal Code, ss. 465, 467, 470, 471

Other source(s) referred to:
Ratanlal & Dhirajlal Law of Crimes (Reprint 2005), pp 2356, 2363

For the appellant - Gurbachan Singh; M/s Bachan & Kartar
For the respondent - S Devanandan DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Akhtar Tahir JC:

[1] The accused in this case was charged in the Sessions Court as follows:

Pertuduhan

Bahawa kamu pada 9 April 1996 di pejabat firma Tetuan Ikmal Hisam Idris, Bhal & Co., di Tingkat 6, Wisma Swee Lee, No. 72, Jalan Temerloh-Mentakab, di daerah Temerloh, di negeri Pahang Darul Makmur, dengan curangnya telah menggunakan suatu dokumen sebagai tulin iaitu satu surat akuan bersumpah bertarikh 9 April 1996, yang mana kamu mempunyai sebab untuk mempercayai bahawa dokumen itu adalah palsu dan oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 471 Kanun Kesiksaan dibaca bersama seksyen 467 Kanun yang sama.

[2] At the end of the whole case where seven prosecution witnesses were called and the accused giving evidence under oath, the learned Sessions Court judge found the accused guilty of the charge and sentenced him to ten years imprisonment.

[3] The accused appealed against his conviction and sentence as pronounced by the learned Sessions Court judge.

[4] I do not propose to go into the details of the evidence adduced suffice if it were to be stated that the accused was found guilty of using a forged document as genuine. The forged documents (P5A and P5B) were statutory declarations purportedly signed by Lu Yoh Yin @ Loh Kon Yin (SP1) facilitating the preparation of the sales and purchase agreement (P10) for the property mentioned in the statutory declaration.

[5] SP1 in her testimony denied any knowledge of the exhs. P5A and P5B and denied that the signature on the documents were hers. Her testimony was corroborated by the testimony of her husband SP2 who was familiar with her signature and the testimony of SP5 a document examiner who was called as an expert witness who concluded that SP1 did not sign the said documents.

[6] The documents P5A and P5B were first handed to Karam Singh Harcharan Singh (SP4) an advocate and solicitor for the purposes of attestation. Subsequently copies of these documents were used to enter a private caveat by one Ng Ah Kwan on the land belonging to SP1.

[7] The trust of the argument of the accused in the appeal before me was the failure of the learned Sessions Court judge in taking into account the fact that SP4 who attested the documents P5A and P5B in the absence of SP1 had made him an accomplice and unworthy of credit.

[8] I disagreed with this contention of the accused and upon the reading of the evidence in an entirety I was satisfied that an offence under s. 471 of the Penal Code had been made out against the accused and the prosecution had succeeded in proving the charge under s. 471 Penal Code beyond reasonable doubt.

[9] I therefore upheld the conviction of the accused under s. 471 of the Penal Code. However it was my subsequent ruling on sentencing that has prompted the prosecution to appeal to the Court Of Appeal.

[10] It is clear in this case that the sentence in this case was imposed based on s. 471 of the Penal Code being read together with s. 467 of the Penal Code which imposes a maximum sentence of 20 years if the forged document is a valuable security. Section 465 of the Penal Code is the sentencing provision if the forged document is not a valuable security.

[11] It is essential to determine the exact relationship between these three provisions of the law for an appropriate sentence to be meted out. For ease of reference the three provisions are set out in full.

Section 471:

> Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document

Section 467:

> Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receiver or deliver any money, movable property or valuable security, or any document purporting to be an acquittance or receipt, acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

Section 465:

> Whoever commits forgery shall be punished with imprisonment for a team which may extend to two years, or with fine, or with both.

[12] On interpretation of statutory penal provision I was guided by what was stated by Chong Siew Fai CJ (Sabah & Sarawak) in the case of *Muhammed Hassan v. PP* [1998] 2 CLJ 170 as follows:

> In deciding this issue, it is necessary, first and foremost, to bear in mind that both sub-ss (d) and (da) of section 37 of the Act, being penal provisions, must be strictly construed, and must not be extended beyond their clear meaning. *Liew Sai Wah v. PP* [1968] [1968] 2 MLJ 1 PC; *PP v. Leong Kuai Hong* [1981] 1 MLJ 246 FC. See also *Stenhenson v. Higginson* [1851] 3 HL Cas 638 where Lord Truro observed: (p. 686).

A ... but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the Legislature that those words should be understood in a more large or popular sense, must plainly appear.

B And, in *R v. Cuthbertson* [1980] 2 All ER 401 HL where a forfeiture provisions in the Misuse of Drugs Act 1971 (English) was called for construction, Lord Diplock observed: (p. 404).

The fact that the section is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear.

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The wordings of sub-ss (d) and (da) of section 37 are clear and unequivocal. That being so, their meanings must be determined from the language employed and the two subsections must be taken to mean exactly what they respectively say. Also, generally speaking, if the words in a statute admit of two interpretations, then they are not clear, and if one interpretation is more favourable to an accused than the other, the court will adopt the one more favourable to the accused.

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Since the literal meanings of the two subsections are intelligible, they must not be extended on the ground that there has been a slip or a matter not provided for which should have been provided for. Any ambiguity or slip would be a matter for the Legislature. In *Magor And St Mellons Rural District Council v. Newport Corporation* [1952] AC 189 HL Lord Simonds observed: (191)

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F The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited ... If a gap is disclosed, the remedy lies in a amending Act.

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In our view, there is a clear undeniable distinction between the word "deemed" used in section 37(d) and the word "found" employed in section 37(da) of the Act. The 'deemed' state of affairs in section 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs ie, the finding of custody or control. Such presumptions as under section 37(d) (and, for that matter, the one under section 37(da) are sometimes described as "compelling presumptions" in that upon proof of certain facts by a party (in our present case, proof of custody or control in section 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other

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party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word "found" in the opening phrase of section 37(da) connotes a finding after a trial by the court.

[13] Coming to the matter at hand a literal and proper reading of s. 471 shows that the person using a forged document shall be punished in the same manner as if he had forged the document. A careful reading of this provision show using a forged document does not equate it to forging the document but merely equate it to forging the document for purposes of sentencing. No presumption or inference arises in this provision that in using a forged document the person is said to have forged the document.

[14] Section 467 on the other hand starts off with the phrase 'Whoever forges a document'. To me therefore there is no nexus between s. 471 and s. 467 of the Penal Code. Both the provisions must be read separately and putting both the provisions together is tantamount to a misjoinder and falls foul of s. 163 of the Criminal Procedure Code which provides that for every distinct offence there shall be a separate charge.

[15] Further there is no evidence and neither did the prosecution in this case attempt to prove that the accused had forged the document to bring the offence under s. 467 of the Penal Code.

[16] I am further gratified in my views with regards to the relationship between s. 467 and s. 471 of the Penal Code by the commentary in *Ratanlal & Dhirajlal Law of Crimes* (Reprint 2005) at p. 2363 where it stated as follows:

Section 467 and 471:

Where owing to some reason (eg, absence of jurisdiction) the accused cannot be charged under section 467, he can be charged and convicted under section 471. There is no bar in law for a conviction under section 471 alone even if there is a acquittal for the offence under section 465 or section 467. An acquittal under section 467 only means that it has been proved that the accused were the persons who had actually forged the document. But using a document is quite independent and separate from forging a document. And section 471 comes into play when a person knowing a document to be forged uses it fraudulently. Where the accused was charged under section 467, but it appeared in evidence that he

had committed an offence under section 471 for which he might have been charged under section 236 of the Criminal Procedure Code, it was held that although he was not charged with it, he could be convicted of an offence under section 471. When a person convicted under sections 467 and 109 for having abetted the forging of a document, he cannot be further convicted and sentenced under section 471 for using that document as genuine.

[17] The same book at p. 2356 highlights the recommendation of The Law Commission to substitute s. 470 and 471 as follows:

Amendment:

The Law Commission has recommended to substitute sections 470 and 471 thus:

470. Forged document - A document in respect of which, or any part of which forgery has been committed is a forged document.

471. Using as genuine a forged document - Whoever fraudulently or dishonestly uses as genuine any document which he knows, or has reason to believe to be a forged document:

(a) shall, if the document is one of the description mentioned in section 466 or section 467, be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and

(b) shall, in any other case, be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.

[18] As the matter stands now, in this case since an offence under s. 471 Penal Code has been proven the correct section for punishment is s. 465 of the Penal Code which provides for a maximum term of imprisonment of two years.

[19] After taking into consideration of the mitigation of the accused, the facts of the case as well as the age of the accused, I imposed a term of 12 months imprisonment from the date the accused was convicted in the Sessions Court.